

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FERNANDO GONZALEZ,
Petitioner,

VS.

RODNEY W. CHANDLER, Warden,
FCI-FORT WORTH,
Respondent.

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Civil Action No. 4:15-CV-399-O

OPINION AND ORDER

Before the Court is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 filed by Petitioner, Fernando Gonzalez, a federal prisoner confined in the Federal Correctional Institution in Fort Worth (FCI-Fort Worth), against Rodney W. Chandler, Warden of FCI-Fort Worth, Respondent. After considering the pleadings and relief sought by Petitioner, the Court has concluded that the petition should be dismissed for lack of jurisdiction.

I. BACKGROUND

Petitioner is serving a 292-month term of imprisonment as a career-offender on his 2010 conviction for possession with intent to distribute a quantity in excess of 50 grams of methamphetamine out of the United States District Court for the Southern District of Texas. Resp't's App. 1, ECF No. 8. In this § 2241 petition, petitioner raises one claim in which he asserts that he is actually innocent of being a career offender pursuant to U.S.S.G. § 4B1.1(a)(2) because his prior conviction for escape, which was merely a "walkaway," is not a crime of violence and was improperly used for enhancement. Pet. 5, ECF No. 1; Pet'r's Mem. 5, ECF No. 2. He requests the Court "resentence him to time served." Pet'r's Mem. 1, ECF No. 2.

II. DISCUSSION

A habeas petition under § 2241 is generally used to challenge the manner in which a sentence is executed and a § 2255 motion is the primary means under which a federal prisoner may collaterally attack the legality of a conviction or sentence. *See Cox v. Warden, Fed. Det. Ctr.*, 911 F.2d 1111, 1113 (5th Cir. 1990). A § 2241 petition attacking a federal conviction or sentence may only be considered if the petitioner establishes that the remedy under § 2255 is inadequate or ineffective. *Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir. 2000). In order to meet this burden, a petitioner must satisfy the so-called “savings clause” under § 2255(e) by showing that (1) the petition raises a claim that is based on a retroactively applicable Supreme Court decision, (2) the claim was foreclosed by circuit law at the time when it should have been raised in the petitioner’s trial, appeal, or first § 2255 motion, and (3) that retroactively applicable decision establishes that the petitioner may have been convicted of a nonexistent offense. *Garland v. Roy*, 615 F.3d 391, 394 (5th Cir. 2010); *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001).

Although Petitioner conclusively states that he “squarely” meets all three factors, his argument fails. Petitioner raised the instant claim in his first § 2255 motion, to no avail, relying primarily on the Supreme Court cases in *Begay v. United States*, 553 U.S. 137 (2008), and *Chambers v. United States*, 555 U.S. 122 (2009), both of which were decided before his conviction and sentence. Mot. & Order, U.S. v. Gonzalez, No. 5:09-CR-806-1 (S.D.Tex. July 5 & July 11, 2011), ECF Nos. 47-47. Thus, the sentencing court has already considered Petitioner’s claim, which he simply recasts in a § 2241 petition, and determined he is not entitled to relief. Relief is not available in a § 2241 petition under the savings clause based on grounds previously denied in a § 2255 motion. *Kinder v. Purdy*, 222 F.3d 209, 214 (5th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001). Moreover,

innocence of a sentence enhancement is not the same as actual innocence of the underlying criminal offense. *Id.* at 213. Because Petitioner cannot invoke the savings clause of § 2255 as to the claim presented in this § 2241 habeas proceeding, the Court is without jurisdiction to consider the petition. *See Christopher v. Miles*, 342 F.3d 378, 385 (5th Cir. 2003).

III. CONCLUSION

Because Petitioner may not assert the claim raised *via* a § 2241 petition, the petition should be dismissed for lack of jurisdiction. For the reasons discussed herein, the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 is **DISMISSED** for lack of jurisdiction. Further, for the reasons discussed herein, a certificate of appealability is denied.

SO ORDERED on this 22nd day of October, 2015.


Reed O'Connor
UNITED STATES DISTRICT JUDGE